

Schuler v Town of Oyster Bay
2018 NY Slip Op 34421(U)
January 25, 2018
Supreme Court, Nassau County
Docket Number: Index No. 605719/14
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____ x

JAMES SCHULER,

Plaintiff(s),

-against-

TOWN OF OYSTER BAY,

Defendant(s).

_____ x

TRIAL/IAS, PART 23
NASSAU COUNTY

Index No.: 605719/14

Motion Seq. No.: 003 & 004
Motion Submitted: 11/9/17

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Notice of Cross Motion/Opposition.....X
- Reply Affirmation.....X

Defendant, Town of Oyster Bay (Town), moves this court for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint against it. Plaintiff, James Schuler (Schuler), opposes the motion and cross moves for leave to amend his bill of particulars pursuant to CPLR §3025(b). The Town opposes the cross motion.

Plaintiff commenced this action, sounding in negligence, by service of a summons and complaint, dated October 28, 2014. Issue was joined by service of an answer dated

April 30, 2015. The case certified ready for trial on March 21, 2017 and a note of issue was filed on April 27, 2017.

On August 3, 2013, Schuler was employed by Progressive Waste Solutions¹ as a heavy equipment operator. He worked at a facility owned by the Town, but operated by Progressive. Progressive and the Town had a contract where Progressive was able to use the premises, and was largely responsible for maintaining the premises. On the premises, Progressive would load up trucks with solid waste and transport it to another location. Once a truck was filled with solid waste, it would go to the tarping station to have a tarp draped over the top to prevent any of the waste from falling out. The tarping station was covered on the top but was open on all sides and contained two bays. There were steps that led up to catwalks that were used to drape the tarp over the trucks. Often two employees would put the tarp on, but one could do it alone. Shuler did not usually put tarps on the truck, and would only do so when Progressive was shorthanded. One such shorthanded day was August 3, 2013, and Shuler had climbed onto a catwalk to help put a tarp over a truck. After he was done, he was walking down one of the metal staircases when he heard a loud noise. He turned his head to see where the noise was coming from and what it was. Afterward, he reached for the handrail to continue to walk down the steps. However, the handrail was bent, so that when he reached for it, it was not there. This caused him to lose his balance and fall. As a result, he was allegedly seriously

¹Both prior to the date of the accident and after, Schuler testified he worked for Winter Bros., which sold Progressive and then purchased it back.

injured.

THE TOWN'S MOTION FOR SUMMARY JUDGMENT

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept

1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 NY2d 361 [1974]).

“A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk” (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2nd Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]).

“To impose liability upon a defendant landowner for a plaintiff’s injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established. (*Ruggiero v. City School District of New Rochelle*, 109 A.D.3d 894 [2nd Dept 2013]; *Soto v. City of New York*, 244 A.D.2d 544 [2nd Dept. 1997], *James v. Stark*, 183 A.D.2d 873 [2nd Dept. 1982]).

Herein, it is undisputed that on the date of the accident Progressive and the Town were parties to a contract that allowed Progressive to use the premises. The Town argues

that the contract required Progressive to “maintain and repair” the facilities, including the tarping station. Further, the Town asserts it did not maintain the facilities and that the “tarp rack was solely in the purview of Progressive”. However, this statement is not entirely accurate. The contract gave the Town the authority to inspect the facilities “at any time.” Further, the contract required Progressive to make “the entire Transfer Facility available” to the Town for its own purposes 15 weekends each year. Based upon these provisions of the contract, the court finds the Town has failed to establish entitlement to summary judgment as a matter of law regarding the issue of control of the property. (*Yehia v. Marphil Realty Corp.*, 130 A.D.3d 615 [2d Dept. 2015]).

The Town also argues it neither created the defective condition, nor had actual or constructive notice of the defective condition. As it is clear that the Town was never provided with actual notice, the question is whether the Town had constructive notice. It is the Town’s burden to establish lack of constructive notice. (*Moreno v. County of Nassau*, 127 AD3d 707 [2d Dept. 2015]; *Hecht v. Saccoccio*, 120 AD3d 474 [2d Dept. 2014]). Where an out-of-possession landowner reserves the right to enter premises for the purposes of inspections, then an issue of fact will exist as to whether that right provides the owner with constructive notice of defects upon the property. (*Pellegrino v. Walker Theater, Inc.* 127 AD2d 574 [2d Dept; 1987]). Herein, the contract gave the Town the right to enter the property for purposes of inspections, and the Town further reserved the right to enter the property to use it for its own purposes. Further, the Town’s witness, Christopher Geary, testified at his deposition to having no idea how long the

defective condition existed. The court therefore finds the Town has failed to establish entitlement to summary judgment on the issue of notice. As such, its motion will be denied regardless of the sufficiency of the opposition papers. (*Winegard v. New York University Medical Center, supra*)

SCHULER'S MOTION TO AMEND THE BILL OF PARTICULARS

“Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit” (*Bloom v. Lugli*, 102 AD3d 715 [2nd Dept. 2013]; quoting *Greco v. Christoffersen*, 70 AD3d 769, 770 [2nd Dept. 2010], quoting *Gitlin v. Chirinkin*, 60 AD3d 901, 901–902 [2nd Dept. 2009]; see CPLR 3025[b];). “A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed” (*Gitlin*, 60 AD3d at 902; see *Greco*, 70 A.D.3d at 770). “The granting of such leave is committed to the sound discretion of the trial court and must be determined on a case by case basis” (*Biaggi & Biaggi v. 175 Medical Vision Properties, LLC*, 105 AD3d 790, 791 [2nd Dept. April 10, 2013]; quoting *Skinner v. Scobbo*, 221 A.D.2d 334, 335 [2nd Dept. 1995]).

Herein, while the addition of violations of Occupational Safety and Health Act regulations to a bill of particulars is, arguably, an allowable amendment at this stage in the proceedings, the Town properly points out that such regulations only apply to the employer/employee relationship. (*Khan v. Bangla Motor and Body Shop*, 27 AD3d 526

[2d Dept. 2006]; *Delaney v. City of New York*, 78 AD3d 540 [1st Dept. 2010]). As there is no allegation or evidence that Schuler was an employee of the Town, the amendment is patently devoid of merit.

Accordingly, it is hereby

ORDERED, that the Town's motion for summary judgment is DENIED; and it is further

ORDERED, that Schuler's motion for leave to amend the bill of particulars is DENIED.

This foregoing constitutes the Decision and Order of the Court.

Dated: January 25, 2018
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED
JAN 30 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE